Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States
October Term, 1996

RONALD EDWARD SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

I. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Third Circuit, upholding the United States District Court's ruling permitting the introduction of evidence of a prior arrest of the Petitioner either pursuant to Federal Rule of Evidence 404(b), or as intrinsic evidence of the elements of the crime, where Petitioner was not afforded an opportunity to challenge the validity of the evidence through suppression motions and further offered and was willing to enter into as broad a stipulation as needed to remove the issue from the case, in light of the Second Circuit Court of Appeals' decision which conflicts with these holdings and states that as a matter of law, a district court abuses its discretion by admitting prior bad act evidence where a defendant has taken sufficient steps to remove the issue of knowledge or intent from the case?

II. Should this Court grant certiorari to review the United States Court of Appeals for the Third Circuit's decision that the United States sentencing guidelines with respect to crack cocaine penalties are constitutional and not violative of due process, equal protection and the Eighth Amendment prohibition against disproportionate penalties in light of, and in direct conflict with, the United States Sentencing Commission's recent special report issued on February 28, 1995, undercutting the rational basis behind the 100 to 1 treatment of crack cocaine offenses versus powder cocaine offenses?

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RONALD EDWARD SMITH,

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Petition For Writ of Certiorari To The United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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Petitioner, Ronald Edward Smith, respectfully prays that a Writ of Certiorari issue to review the judgment of conviction and sentence of the United States District Court for

the Western District of Pennsylvania entered on July 14, 1995, and the subsequent holding of the United States Court of Appeals for the Third Circuit affirming the judgment of conviction and sentence on October 18, 1996.

OPINIONS BELOW

The United States District Court for the Western District of Pennsylvania granted the Respondent's Motion in Limine over Petitioner's objections allowing the Respondent to introduce at trial evidence of an arrest of the Petitioner, either as other crimes evidence pursuant to Federal Rule of Evidence 404(b), or as intrinsic evidence. The Court thus precluded Petitioner from either moving to suppress statements made by him as well as physical evidence seized from him during this arrest before this evidence was introduced at trial, or from stipulating to the issues sought to be established by the introduction of prior bad act evidence.

The United States District Court for the Western District of Pennsylvania also denied Petitioner's arguments at sentencing that the United States sentencing guidelines establishing sentences for crack cocaine offenses are unconstitutional, in violation of the due process and equal protection clauses of the United States Constitution, as well as the Eighth Amendment prohibiting disproportionate penalties.

On October 18, 1996, the United States Court of Appeals for the Third Circuit affirmed the above holdings of the United States District Court for the Western District of Pennsylvania upholding the judgment of conviction and sentence.

JURISDICTION

On October 18, 1996, the United States Court of Appeals for the Third Circuit at Case No. 95-3410 affirmed the judgment of conviction and sentence of the United States District Court for

the Western District of Pennsylvania at Criminal No. 94-222. This Court's jurisdiction to consider this petition for writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

(a) Eighth Amendment, United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(b) Fourteenth Amendment, United States Constitution:

> ...[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Appellant, Ronald Edward Smith, was charged in two (2) counts of a ten (10) count Indictment returned by a Federal Grand Jury against himself, Harold Berry and George R.

Logan, II. Mr. Smith was charged with conspiracy to distribute in excess of 50 grams of a mixture and substance containing a detectable amount of cocaine base in Count One of the Indictment, along with Co-Defendants Harold Berry and George R. Logan, II. Mr. Smith was charged along with Mr. Berry in Count Two of the Indictment with knowingly, intentionally and unlawfully distributing and possessing with the intent to distribute in excess of 5 grams of a mixture and substance containing a detectable amount of cocaine base on or about April 27, 1994. Counts Three through Ten charged Mr. Berry and Mr. Logan, either individually or jointly, with distributing and possessing with the intent to distribute cocaine base.

On March 13, 1995, a jury trial commenced as to all three (3) of the named Defendants before the Honorable Donald J. Lee. The Respondent offered into evidence an event that occurred on May 5, 1994, which involved state charges that

had been filed against Mr. Smith. In the discovery materials provided to Mr. Smith at the time of his arraignment pursuant to Criminal Rule 16.1, Mr. Smith was provided with any statements or confessions that he purportedly made. Mr. Smith was given several cassette recordings of alleged conversations; however, no mention was made of any alleged statements that Mr. Smith may have made on May 5, 1994. In a letter dated March 17, 1995, the Government provided counsel for the three (3) named Defendants with the Jencks/Brady materials with regard to the then pending trial. On the fourth page of this letter, the Government advised the Defendants, in accordance with Rule 404(b) of the Federal Rules of Evidence, of the Respondent's intention to offer evidence concerning the May 5, 1994 arrest of Mr. Smith.

Mr. Smith subsequently sought to challenge this evidence, and the Respondent sought a pretrial determination of the admissibility of

this evidence. In the Respondent's Motion in Limine, the Respondent sought to use three categories of evidence under Rule 404(b) of the Federal Rules of Evidence. Mr. Smith sought to exclude the evidence of the May 5, 1994 event. Mr. Smith also argued that by admitting this evidence, the Court opened up suppression issues concerning the propriety of the search and the validity of the Defendant's statement, which purportedly occurred after Mr. Smith had been Mirandized. However, no Miranda warning forms existed in this case. The Government argued that suppression issues were not appropriate with respect to 404(b) evidence. On March 31, 1995, the Court ruled that the Respondent could use this evidence. The Honorable Donald Lee in his ruling indicated his belief that the evidence was not really 404(b) evidence, but rather intrinsic evidence which established an element of the conspiracy charge.

On April 25, 1995, the jury returned a verdict finding all three (3) Defendants guilty of the conspiracy charged at Count One. Both Mr. Smith and Mr. Berry were found not guilty of the distribution and possession with the intent to distribute count charged at Count Two of the Indictment. Mr. Berry and Mr. Logan were found guilty of all of the remaining distribution counts at Counts Three through Ten of the Indictment, as those counts applied to each of those Defendants.

On July 14, 1995, Mr. Smith was sentenced to a term of imprisonment of eight-four (84) months at Count One of the Indictment. This term of imprisonment was to be followed by a term of supervised release of sixty (60) months. At sentencing, Mr. Smith argued that the United States Sentencing Guidelines in regard to establishing penalties for crack cocaine offenses were unconstitutional in light of the United States Sentencing Commission's most recent

acknowledgments that the factors which had supported a difference between powder cocaine and crack cocaine, did not justify the 100 to 1 disparity between the two levels of guideline sentences. A timely Notice of Appeal was subsequently filed on Mr. Smith's behalf.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT UPHOLDING THE UNITED STATES DISTRICT COURT'S RULING PERMITTING THE INTRODUCTION OF EVIDENCE OF THE PRIOR ARREST OF THE PETITIONER EITHER PURSUANT TO FEDERAL RULE OF EVIDENCE 404(B), OR AS INTRINSIC EVIDENCE OF THE ELEMENTS OF THE CRIME, WHERE PETITIONER WAS NOT AFFORDED AN OPPORTUNITY TO CHALLENGE THE VALIDITY OF THE EVIDENCE THROUGH SUPPRESSION MOTIONS OR BY THE ENTRY OF AS BROAD A STIPULATION AS NECESSARY TO REMOVE THE ISSUE FROM THE CASE IN LIGHT OF THE SECOND CIRCUIT COURT OF APPEALS DECISION WHICH CONFLICTS WITH THESE HOLDINGS AND STATES THAT AS A MATTER OF LAW, A DISTRICT COURT ABUSES ITS DISCRETION BY ADMITTING PRIOR BAD ACT EVIDENCE WHERE A DEFENDANT HAS TAKEN SUFFICIENT STEPS TO REMOVE THE ISSUE OF KNOWLEDGE OR INTENT FROM THE CASE?

Over defense objection, the Court permitted the Respondent to introduce evidence of the

arrest of Petitioner on May 5, 1994, in a store owned by Co-Defendant Berry. The court permitted the Respondent to introduce crack cocaine seized from the Petitioner following a search of his person on that occasion, as well as statements purportedly made by Petitioner following his arrest.

While the Court and Respondent vacillated between considering this evidence as prior bad act evidence or intrinsic evidence of the conspiracy, it is clear that the Court's instruction to the jury treated this evidence as prior bad act evidence. Similarly, the Court's ruling precluding Petitioner from seeking to suppress statements obtained and evidence seized from him on May 5, 1994, suggests that the lower Court treated this evidence as other bad act evidence. In either event, Petitioner believes that the court erred by permitting the Respondent to introduce this evidence, and that the

admission of this evidence warrants the reversal of his conviction and the grant of a new trial.

Prior bad act evidence is not admissible to prove that a defendant "acted in conformity therewith." Such evidence may be admissible, however, for other purposes such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b).

Rule 404(b) has been recognized as a rule of inclusion rather than exclusion. United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir.), cert. denied, 488 U.S. 910 (1988).

In order for prior bad act evidence to be admissible, four (4) guidelines must be met: (1) the evidence must have a proper purpose under Rule 404(b); the evidence must be relevant under rule 402; (3) the probative value of the evidence proffered must outweigh its prejudicial effect under Rule 403 and (4) the court must charge the jury that they are to consider the evidence only

for the limited purpose for which it has been admitted. Huddleston v. United States, 485 U.S. 681, 691-92 (1988); United States v. Sampson, 980 F.2d 883, 886 (3d Cir. 1992).

The Respondent offered two (2) reasons why they believed the May 5, 1994 evidence should be admissible at trial against Petitioner. The Respondent first generally contended that this evidence would be admissible to show that Petitioner and Mr. Berry knew each other. The Respondent's Motion in Limine, however, most strongly characterized the purported relevance of this evidence as a means of showing Petitioner's intent concerning the substantive crime charged in Count Two of the Indictment.

The fact that Mr. Berry and Petitioner knew each other was simply not an issue in this case. A review of the record clearly reveals that this issue was never in dispute. In fact, the Respondent offered other evidence at trial to establish that Petitioner and Mr. Berry knew each

other. Thus, the Respondent's need for this evidence for the purpose of showing that Smith and Berry knew each other was remote.

Further, nothing about the evidence showed that Petitioner and Berry knew each other. Rather, the evidence merely showed that Smith was speaking to a white male in an automobile on the street outside of Berry's store and that upon the approach of the police, Smith moved into Berry's store. While Berry was present in the store at the time of Smith's arrival, there is absolutely no evidence that any contact took place between Smith and Berry, nor were any words spoken between them. In short, there is nothing about this particular event that would establish any probative value to show that Smith and Berry knew each other. Further, any probative value for this element is clearly outweighed by the prejudice from permitting testimonial and physical evidence of another crime unrelated to Mr. Berry.

The real reason the Respondent intended to offer this evidence at trial was to show Petitioner's intent. Counsel for Smith argued that the Respondent's need for this evidence was slight. The Court rejected Petitioner's Rule 403 argument and ruled that the Respondent could offer this evidence.

Counsel for Petitioner, relying on the Third Circuit Court of Appeals' decision in United States v. Jemal, 26 F.3d 1267 (3d Cir. 1994), then offered to stipulate to this evidence. Counsel for Petitioner offered to enter into as broad and comprehensive a stipulation as the Respondent desired. Both the Respondent and the Court rejected Smith's ability to stipulate to this evidence, however.

Initially, Petitioner suggests that the Court erred in balancing the Respondent's need for the evidence of the May 5, 1994 event with the prejudice therefrom. The Respondent's case against Petitioner was predicated upon the

testimony of Andre Brooks. Brooks' testimony reflected that Smith had actually delivered drugs to him. This was not a case where the Government searched Petitioner or Petitioner's home and found a quantity of drugs. This was not a case where the issue was whether drugs found on Smith were intended for distribution rather than for personal consumption. Rather, the issue here was whether Mr. Brooks was believable when he testified that it was Smith who distributed drugs to him. Thus, Petitioner's intent was not truly a focal point in this trial. The question was whether Smith distributed, and not whether Smith intended to distribute.

Assuming arguendo that this evidence was properly admissible pursuant to Rule 404(b), Petitioner suggests that the Court erred by failing to permit him to stipulate to the issue of intent.

In United States v. Jemal, 26, F.3d 1267 (3d Cir. 1994), the Court of Appeals for the Third

Circuit examined the ability of a defendant to stipulate to an issue which the Respondent sought to establish through the introduction of Rule 404(b) evidence. The Jemal Court observed that the Second Circuit of Appeals had held that a district court abuses its discretion by admitting prior bad act evidence where a defendant has taken sufficient steps to remove the issue of knowledge or intent from the case. See United States v. Manafzadeh, 592 F.2d 81, 87 (2d Cir. 1979); United States v. Mohel, 604 F.2d 748, 753 (2d Cir. 1979); United States v. Figueroa, 618 F.2d 934, 941-42 (2d Cir. 1980).

"...Where a defendant has claimed that he did not distribute drugs at all rather than he distributed a substance that turned out to be drugs without knowledge that the substance was drugs, the Second Circuit has precluded the admission of prior crime evidence." United States v. Jemal, 26 F.3d at 1273. See also United States v. Mohel, 604 F.2d at 755; United States

v. Figueroa, 618 F.2d at 944; United States v. Colon, 880 F.2d 650, 662 (2d Cir. 1989). Thus, according to the Second Circuit, a defendant can avoid the introduction of other bad acts evidence to establish knowledge or intent if his defense is that he did not do the charged act at all. United States v. Ortiz, 857 F.2d 900, 903 (2d Cir. 1988), cert. denied, 489 U.S. 1070 (1989).

Before Jemal, the Court of Appeals for the Third Circuit had discussed the use of stipulations to remove Rule 404(b) evidence from a case. See United States v. Provenzano, 620 F.2d 985 (3d Cir.), cert. denied, 449 U.S. 899 (1980). In Provenzano, the Court of Appeals for the Third Circuit noted that "an offer to stipulate does not automatically mean that the fact may not be proved instead, as long as the probative value of the proof still exceeds the prejudicial effect, taking into account the offer to stipulate." See also United States v.

Sheeran, 699 F.2d 112, 118 at n.12 (3d Cir. 1983).

In Jemal, the Court of Appeals for the Third Circuit, while not adopting the per se rule of the Second Circuit, noted that:

> ...Although we leave the door open, we believe that district courts should generally deem prior bad acts evidence inadmissible to prove an issue that the defendant makes clear he is not contesting. The relevance of the prior bad acts evidence will be minimal in most such cases, since the evidence will not bear on the issues being contested. And the undue prejudice will be quite high, since prior bad acts evidence tends to be quite persuasive. This is consistent with Provenzano's rule that stipulations should be taken into account in conducting a Rule 403 balancing analysis. See United States v. Hernandez, 975 F.2d 1035, 1040 (4th Cir. 1992)(employing a Rule 403 balancing analysis to reverse a district court's decision to admit evidence of defendant's prior sale of crack where the defense was that the defendant did not sell the crack involved at all and where there was no indication that the district court had carefully balanced the evidence).

Jemal, 26 F.3d at 1274.

In this case, counsel for Petitioner offered to enter into whatever stipulation the Respondent desired. Counsel for Petitioner offered to enter into as comprehensive and unreserved a stipulation as the Respondent wanted. The Respondent simply refused any attempts at stipulating, however, believing that they were not required to do so.

The instant fact scenario is analogous to that which the Jemal Court cited to in United States v. Hernandez, as well as those Second Circuit cases cited by Jemal. As previously noted, intent was simply not the issue in this case. Rather, the issue was whether Petitioner had in fact sold drugs to Mr. Brooks at all. Clearly, the Court erred by not permitting Petitioner to enter into an unreserved and comprehensive stipulation, as he requested, to prevent this other bad acts evidence from unduly prejudicing him. Accordingly, Petitioner

believes that his conviction must be reversed and his case remanded for a new trial.

Should this Honorable Court determine that the evidence in question did not constitute other bad acts evidence, but rather intrinsic evidence of the conspiracy charged, Petitioner submits that the Court then erred in refusing to allow him to move to suppress the evidence seized from him and the statements made by him following his arrest by the City of Pittsburgh Police on May 5, 1994.

The court accepted the Respondent's argument that Petitioner was unable to challenge the admissibility of this evidence, as that evidence, according to the Respondent, was other crimes evidence. Thus, the Respondent argued and the Court accepted on the one hand, that the May 5, 1994 incident constituted intrinsic evidence of the conspiracy such that Petitioner could not stipulate to the element of intent. The Respondent argued and the Court accepted,

however, on the other hand, that this evidence constituted other crimes evidence so that Petitioner was precluded from challenging the lawfulness of the search of his person, and whether he had knowingly, voluntarily and intelligently waived his Miranda rights.

Petitioner submits that it simply cannot be both ways--the evidence must either be direct evidence of the conspiracy, subject to his ability to move to suppress that evidence, or other crimes evidence, subject to his ability to stipulate away where intent is not an issue of dispute in a trial. In either event, Petitioner's rights to a fair trial were violated, and he respectfully requests this Honorable Court to reverse his conviction and to remand for a new trial.

For the within reasons, the Petitioner, Ronald Edward Smith, respectfully requests this Honorable Court grant a writ of certiorari and review the lower court's holdings.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT THAT THE UNITED STATES SENTENCING GUIDELINES CONCERNING CRACK COCAINE PENALTIES ARE CONSTITUTIONAL AND NOT VIOLATIVE OF DUE PROCESS, EQUAL PROTECTION AND THE EIGHTH AMENDMENT PROHIBITION AGAINST DISPROPORTIONATE PENALTIES IN LIGHT OF THEIR DIRECT CONFLICT WITH THE UNITED STATES SENTENCING COMMISSION'S RECENT SPECIAL REPORT ISSUED ON FEBRUARY 28, 1995, UNDERCUTTING THE RATIONAL BASIS BEHIND THE 100 TO 1 TREATMENT OF CRACK COCAINE OFFENSES VERSUS POWDER COCAINE OFFENSES?

To date, the sentencing guidelines for crack cocaine penalties have been upheld against a multitude of constitutional attacks by all circuits that have considered the issue. See United States v. Jones, 979, F.2d 317 (3d Cir. 1992); United States v. Frazier, 981 F.2d 92 (3d Cir. 1992), cert. denied, 123 L.Ed.2d 279. The court's considering the constitutionality of the sentencing guidelines' 100 to 1 treatment of crack cocaine versus powder cocaine have based their decision upholding the constitutionality of the guidelines in part upon the notion that a

rational basis existed for this treatment See Jones, 979 F.2d at 319.

In Jones, the Third Circuit Court of Appeals listed what it believed to be a variety of rational purposes for the distinction between crack and powder cocaine. The Jones Court noted that:

> "It [crack] is far more addictive than cocaine in its salt form, and is more accessible due to its relatively low cost. It is a different drug from cocaine in the salt form, because it is prepared for inhalation and is absorbed by the body through the lungs. It concentrates and magnifies the effects on the body to such a degree that it can be cheaply manufactured, sold at a relatively low cost, and for an exorbitant profit to the dealer."

Jones, supra at 319.

Since the Third Circuit's decision in Jones, the United States Sentencing Commission has had the opportunity to revisit the rationale for the distinction between crack cocaine penalties and powder cocaine penalties. While the Third Circuit's decision in United States v. Alton, 60 F.3d 1065 (3d Cir. 1995) postdated those

recommendations of the Sentencing Commission, the Alton case did not explicitly revisit the constitutionality of these provisions in light of the Sentencing Commission's most recent acknowledgements.

On February 28, 1995, the United States Sentencing Commission issued a special report on cocaine and the federal sentencing policies set forth in the sentencing guidelines. See Criminal Law Reporter, BNA Vol. 56, No. 21, March 1, 1995. The Commission acknowledged that some courts, including the Court of Appeals for the Third Circuit in United States v. Frazier, had commented upon the problematic nature of the 100 to 1 sentencing scheme, but indicated that resolution of this question was better left to those with authority and institutional capacity to do so. 56 Crim.L.Rep. (BNA) 2168.

While noting that powder cocaine and crack cocaine pharmacologically were the same drug, and that neither form of cocaine was psychologically

addictive, the Commission did note certain distinctions between the two forms of cocaine that might warrant somewhat higher penalties for crack. Nonetheless, the Commission indicated that it could not support the current penalty scheme, and that the factors that suggest a difference between the two forms of cocaine did not approach the level of a 100 to 1 disparity. The Commission further indicated that a 100 to 1 quantity ratio could not be recommended by them. 56 Crim.L.Rep. (BNA) 2170.

The Sentencing Commission later submitted proposed amendments to the federal sentencing guidelines. 57 Crim.L.Rep. (BNA) 2095. The proposed amendments suggested that the 100 to 1 ratio of crack cocaine to powder cocaine be deleted from the sentencing guidelines.

In the reason for amendment section, the Commission noted that a Department of Justice study had noted that a major factor in the ever widening gap between the average sentence imposed

on whites and on minorities was greatly affected by the discrepancy in sentencing lengths for crack and powder cocaine. The Commission concluded that to justify such a penalty differential with such a significant impact on minority groups, it was important to ensure that sufficient policy bases existed. 57 Crim.L.Rep. (BNA) 2097. The Commission ultimately concluded that the penalty differential based solely on the form of the drug should be eliminated from the guidelines.

The United States Sentencing Commission later transmitted information to Congress concerning its proposals for changes to the crack sentencing guidelines. See the Criminal Law Reporter, BNA Vol. 57, No. 9, May 31, 1995. This information reflected that the Commission had unanimously agreed that the 100 to 1 ratio could no longer be recommended and should be changed. The Commission majority statement indicated its belief that the current sentencing scheme, which

calculates all crack cocaine sentences at a 100 to 1 ratio, thus providing sentences several times longer than similar powder cocaine sentences, was "unfair and mistargeted." 57 Crim.L.Rep. (BNA) 2128, 2129.

The statement of the Commission majority pointed to "six inescapable facts" that led the majority of the Sentencing Commission to conclude that the base sentence for crack and powder should be the same. First, the Commission noted that the sentencing guidelines for powder cocaine imposed severe punishment. Second, the Commission noted that powder cocaine and crack cocaine had the same active ingredients, and that both produced the same type of physiological and psychological effects.

Third, the Commission noted that while smoking crack cocaine can lead to addiction, injecting powder cocaine was as dangerous or more dangerous than smoking crack. The Commission determined that the form of cocaine was simply

not a reasonable means of determining dangerousness associated with the use of that substance.

The fourth factor pointed to by the Commission suggested that higher level powder cocaine distributors would be sentenced relatively less severely than some of the crack retailers that they supplied, absent an equal quantity ratio. Next, the Commission noted the obvious punishment inequities inherent in a scheme where 500 grams of powder cocaine, costing up to $75,000.00 and yielding between 1,000 and 5,000 doses, received equivalent penalties as 5 grams of crack cocaine, which yielded between 10 and 50 doses and costed up to $750.00. Finally, the Commission noted that any quantity ratio other than equivalency impacted almost entirely on minority defendants. 57 Crim.L.Rep. (BNA) 2130.

The Commission pointed out that there was little pharmacological distinction between powder

and crack cocaine. While the Commission was split 4 to 3 in completely eliminating distinctions between powder and crack cocaine, the Commission was unanimous that the 100 to 1 ratio was inappropriate. Apparently, the Commission considered appropriate ratios between 1 to 1 and 5 to 1. The majority position indicated that those Commissioners voting with the majority to establish equal penalties for crack and powder cocaine voted that way on the premise of basic fairness to each and every citizen. 57 Crim.L.Rep. (BNA) 2130.

The views of the United States Sentencing Commission, as set forth in their Special Report, their proposed amendments to the sentencing guidelines and the materials transmitted to Congress, suggest that no rational basis exists for the 100 to 1 ratio now present in the sentencing guidelines. Accordingly, Petitioner respectfully suggests that the very underpinnings of the decisions of the Court of Appeals for the

Third Circuit and every circuit court's decision concerning the constitutionality of the crack cocaine guidelines has been undercut. What was once thought to be a rational basis has been shown to be anything but rational. There simply does not exist any valid basis for such a disproportionate result for one dealing in crack cocaine compared to one dealing in powder cocaine.

Merely because the 100 to 1 quantity ratio is racially neutral on its face does not mean that it is sound under the equal protection clause. As early as 1886, this Honorable Court recognized that the discriminatory enforcement of facially neutral laws offends the United States Constitution. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The United States Sentencing Commission has recognized the discriminatory effect of the application of the crack cocaine penalties. While these penalties may appear facially race

neutral, their application clearly has a discriminatory effect.

While a law's racially disproportionate impact alone may not make it unconstitutional, such disproportionality may in fact evidence unconstitutional discrimination. Washington v. Davis, 426 U.S. 229 (1976). Again, the Sentencing Commission's acknowledgement of the extremely severe impact of the crack cocaine sentencing guidelines on the black race may suffice to show that these guidelines are violative of equal protection. See Village of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 266 (1997).

The United States Sentencing Commission's acknowledgement of the troubling racial disparity of this law, and their unanimous rejection of the 100 to 1 quantity ratio, are sufficient grounds to allow this Honorable Court to issue a writ of certiorari and examine the holdings of the lower court which states that the crack cocaine

sentencing guidelines are constitutional. Wherefore, the Appellant, Ronald Edward Smith, respectfully requests this Honorable Court to issue a writ of certiorari and examine the prior decisions upholding the constitutionality of the crack cocaine sentencing guidelines, to declare those guidelines unconstitutional, and to remand his case for resentencing in accordance with this Honorable Court's decision.

CONCLUSION

For all of the foregoing reasons, Petitioner, Ronald Edward Smith, prays that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3410

UNITED STATES OF AMERICA

vs.

RONALD EDWARD SMITH

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 94-cr-00222-2)
District Judge: Honorable Donald J. Lee

Submitted Under Third Circuit LAR 34.1(a)
October 7, 1996
Before: MANSMANN, GREENBERG and GARTH,
Circuit Judges.
(Filed October 18, 1996)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

Criminal defendant Ronald Edward Smith appeals from a judgment of conviction and

sentence entered following a jury trial for drug-related offenses. Smith alleges that the district court erred in finding that there was sufficient evidence to sustain his conviction for conspiracy and in allowing evidence of a May, 1994, arrest to be introduced at trial. Smith also challenges the constitutionality of the crack enhancement provisions of the United States Sentencing Guidelines. Because we conclude that each of these allegations of error lacks merit, we will affirm the judgment of conviction and sentence.

I.

On October, 18, 1994, a federal grand jury in the Western District of Pennsylvania returned a ten-count indictment against Smith and two codefendants.[1] The indictment charged Smith with one count of conspiracy to distribute in

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[1]The appeals of these codefendants, Harold Berry and George Logan, have been consolidated with this one. The issues raised in these appeals are addressed in separate memorandum opinions.

excess of fifty grams of cocaine base in violation of 21 U.S.C. § 846 and with one count of distribution and possession with intent to distribute in excess of five grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii). A jury trial began on March 28, 1995 and, on April 25, 1995, the jury returned a verdict finding Smith guilty on both counts. Smith was sentenced to 84 months imprisonment to be followed by four years of supervised release. This appeal followed.

II.

Smith's first assignment of error concerns the sufficiency of the evidence to sustain his conviction on the conspiracy count. Smith argues that the government failed to demonstrate the required unity of purpose and agreement among the codefendants to work together toward an illegal goal. See United States v. Schramm, 75 F.3d 156, 159 (3d Cir. 1996). Specifically, Smith alleges that the evidence

failed to show that he was associated in any way with codefendant Logan and failed to establish that he conspired with Berry. We disagree.

Smith's argument hinges, in part, on the alleged unreliability of the testimony given by the government's primary witness, informant Andre Brooks. Brooks' testimony served to establish that Smith had met with him outside Berry's store and had sold Brooks cocaine. The testimony was such that one hearing it might infer that the cocaine which Smith sold had been purchased from Berry. Brooks also attributed quantities of crack cocaine found in his apartment and in an alleyway to Smith. Furthermore, in an audiotape recording of a conversation between Brooks and Berry during the transaction of a drug deal, Berry is heard to ask why Brooks didn't call "Ron." Brooks testified that this was a reference to defendant Ron Smith.

In evaluating this testimony, our role is circumscribed:

> It is not for [an appellate court] to weight the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

Glasser v. United States, 315 U.S. 60, 80 (1942). Applying this standard, we conclude that the evidence presented was sufficient to support the jury's conclusion that Smith participated in a scheme designed to distribute drugs for profit. Here, connections between Berry and Smith and Berry and Logan were firmly established.[2] Brooks' description of the locations and details of these buys were sufficiently similar that the jury could have concluded that each transaction was a step in achieving the common goal of drug

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[2]The fact that testimony at trial did not establish that Smith and Logan acted in tandem does not alter our conclusion. The government need not prove that each defendant knew all of the details and goals of or other participants in the conspiracy. United States v. McGlory, 968 F.2d 309, 327 (3d Cir. 1992), cert. denied, 507 U.S. 962 (1993).

distribution. We will not disturb the jury's verdict.

III.

Smith next asks that we review the district court's ruling permitting the government to offer in evidence testimony regarding Smith's arrest on May 5, 1994 by the City of Pittsburgh Police. According to the record before us, Smith was arrested in Berry's store when police discovered that Smith possessed one quarter of an ounce of crack. Following the arrest, Smith received notice of and waived his constitutional rights, admitting that he had sold crack on May 4 and May 5.

The government sought to introduce this evidence pursuant to Rule 404(b) of the Federal Rules of Evidence,[3] arguing that the evidence was

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[3] Rule 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other

relevant to the issue of intent. The district court rejected the 404(b) basis for the testimony, but admitted it nonetheless stating:

> [T]his is really not 404(b) evidence, but rather intrinsic evidence which establishes an element of the crime of conspiracy, that is, the relationship which was in furtherance of the conspiracy...the essence of the conspiracy and...the intent of the parties to distribute cocaine [on April 27, 1994].

Smith argues that the district court abused its discretion in admitting testimony concerning the May 5th arrest, given that Smith offered at trial to stipulate that intent was not an issue.

Our reading of the record reflects Smith's willingness to stipulate that intent was not an issue with respect to the April 27, 1994 distribution which formed the basis of Count II of the indictment. Smith was acquitted on this

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> purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....

count. We cannot conclude, therefore, that the district court's failure to exclude evidence of the arrest on May 5th based on Smith's willingness to enter into a stipulation, was or could be construed as having been prejudicial.[4]

Smith also argues that he should have been permitted to challenge admission of the evidence relating to the May 5th arrest on Fourth Amendment grounds. Smith has not provided us with authority supporting the applicability of suppression in this context and we have not located such authority. In any event, we agree with the government's statement that:

> Smith's admissions to his arresting officers that he sold crack on May 4 and 5, 1994, bore directly on the issue of his intent to distribute crack on April 26, 1994. Because...he was

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[4] The record further reflects that evidence relating to Smith's May 5th arrest was admitted not only to show intent but to demonstrate the fact of conspiracy. Smith never offered to enter into a stipulation regarding the existence of a conspiratorial relationship. In this circumstance, reliance on our ruling in United States v. Jemal, 26 F.3d 1267 (3d Cir. 1994), is misplaced.

> acquitted on this count, if the court erred in admitting this evidence, the error was clearly harmless.

(Govt. Br. p. 31).

IV.

Finally, Smith focuses on the sentence imposed, arguing that the crack enhancement provisions set forth in section 2D1.1 of the Sentencing Guidelines is unconstitutional. Specifically, Smith contends that this provision violates the Fifth Amendment Equal Protection Clause and impinges upon his due process rights. We have previously considered and rejected these arguments. See United States v. Alton, 60 F.3d 1065 (3d Cir.), cert. denied, 116 S.Ct. 5766 (1995). We will not depart from established precedent here.

V.

Because we have failed to find merit in any of Smith's allegations of error, we will affirm the judgment of conviction and sentence.

TO THE CLERK:

Please file the foregoing opinion.

/s/Carol Los Mansmann
Circuit Judge

App.11

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3410

UNITED STATES OF AMERICA

vs.

RONALD EDWARD SMITH

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 94-cr-00222-2)
District Judge: Honorable Donald J. Lee

Before: MANSMANN, GREENBERG and GARTH,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on October 7, 1996

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the district court entered on July 20, 1995, be and the same is hereby affirmed.

ATTEST:

/s/P. Douglas Sisk
Clerk

October 18, 1996